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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

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12 In re Rule 45 Subpoena Directed to Tucows.com  
13 Co

Case No.: 2:21-mc-00024 RSL

Related Case No. 2:19-cv-02746-DWL  
U.S. District Court, District of Arizona

**DEFENDANT GODADDY.COM,  
LLC'S MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO  
COMPEL RESPONSE TO RULE 45  
SUBPOENA DIRECTED TO  
TUCOWS.COM CO**

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17 NOTED ON MOTION CALENDAR:  
Friday, March 12, 2021  
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DEFENDANT GODADDY.COM, LLC'S MEMORANDUM OF  
LAW IN SUPPORT OF MOTION TO COMPEL RESPONSE TO  
RULE 45 SUBPOENA DIRECTED TO TUCOWS.COM CO - 1

LAW OFFICES OF  
**COZEN O'CONNOR**  
A PROFESSIONAL CORPORATION  
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SUITE 1900  
SEATTLE, WASHINGTON 98104  
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1 **I. INTRODUCTION**

2  
3 GoDaddy.com, LLC (“GoDaddy”) brings the instant motion to compel Tucows.com Co  
4 (“Tucows”) to comply with GoDaddy’s document subpoena, which GoDaddy served on Tucows  
5 on January 21, 2021. The return date on the subpoena was February 4, 2021, and to date, Tucows  
6 has not objected to the subpoena, or produced any documents in response to the subpoena.  
7 GoDaddy respectfully requests that the Court enter an order compelling Tucows to comply with  
8 this subpoena.

9 **II. FACTUAL AND PROCEDURAL BACKGROUND**

10  
11 This motion arises out of a subpoena served upon Tucows on January 21, 2021, in a  
12 litigation matter entitled *SiteLock, LLC v. GoDaddy.com, LLC*, pending in the United States  
13 District Court for the District of Arizona (Case No.: 2:19-cv-02746-DWL) (the “SiteLock  
14 Action”). *See* Declaration of Paula L. Zecchini (“Zecchini Decl.”) ¶¶ 1-6, Ex. A. In the SiteLock  
15 Action, Plaintiff SiteLock, LLC (“SiteLock”), has asserted, *inter alia*, breach of contract claims  
16 related to a November 4, 2013 Reseller Agreement (“Reseller Agreement”) between GoDaddy  
17 and SiteLock, which, in part, authorized GoDaddy to promote SiteLock’s off-the-rack software  
18 products. Zecchini Decl. ¶ 2. GoDaddy’s Answer to SiteLock’s Complaint includes an  
19 affirmative defense for set-off, *see* Dkt. No. 13 at 14,<sup>1</sup> which is based in part on SiteLock’s  
20 breach of a most favored nation (“MFN”) provision in the Reseller Agreement that obligated  
21 SiteLock to ensure that GoDaddy was afforded “the lowest [pricing terms] offered by SiteLock  
22 or any of its affiliates.” Dkt. No. 1-2, at 8; Zecchini Decl. ¶ 3. In the SiteLock Action, GoDaddy  
23 sought discovery related to its defense based on SiteLock’s breach of the MFN provision, and  
24 SiteLock ultimately produced—under a Court Order compelling their production—third party  
25 reseller agreements that included SiteLock’s contract with Tucows. Zecchini Decl. ¶ 4. That

26 <sup>1</sup> Citations to the docket are to the corresponding entries in the SiteLock Action.

1 agreement indicates that SiteLock gave Tucows more favorable pricing terms than GoDaddy.  
 2 *Id.* at ¶ 5. Therefore, GoDaddy served the subpoena on Tucows to obtain limited, narrow  
 3 discovery from Tucows regarding (1) the lowest pricing terms SiteLock gave to Tucows, and  
 4 (2) the features of the SiteLock products Tucows offered.<sup>2</sup> *See* Zecchini Decl. ¶ 6, Ex. A. On  
 5 January 6, 2021, the Court in the SiteLock Action denied SiteLock’s motion for protective order  
 6 which concerned, in part, third party document subpoenas GoDaddy had served on other entities  
 7 seeking the same categories of information sought in the Tucows subpoena. *See* Dkt. No. 248;  
 8 Zecchini Decl. ¶ 9.

9 The time specified for compliance in the subpoena that GoDaddy served on Tucows was  
 10 February 4, 2021. Zecchini Decl. ¶ 6, Ex. A. The location specified for compliance was  
 11 “Produce electronically to Paula Zecchini, Cozen O’Connor, 999 Third Avenue, Suite 1900,  
 12 Seattle, WA 98104 at PZecchini@cozen.com.” *Id.* Tucows has not, to date, produced any  
 13 documents in response to the subpoena, or served any response or objection to the subpoena. *Id.*  
 14 at ¶ 8. SiteLock has not, to date, served any objection or responses to the subpoena, nor has it  
 15 made any effort to address the subpoena with GoDaddy, either independently or on Tucows’s  
 16 behalf. *Id.* at ¶ 9.

### 17 **III. LEGAL STANDARD**

18  
 19 The Federal Rules of Civil Procedure allow a party to obtain from a non-party discovery  
 20 materials of any non-privileged matter that is relevant to a claim or defense of any party. *See*  
 21 Fed. R. Civ. Pro. 45(a)(1)(C); Fed. R. Civ. Pro. 26(b)(1). The “scope of discovery through a  
 22 subpoena is the same as that applicable to Rule 34 and other discovery rules.” *Gonzales v.*  
 23 *Google, Inc.*, 234 F.R.D. 674, 679 (N.D. Cal. 2006); *see also* *Lewin v. Nackard Bottling Co.*,  
 24 No. CV 10-8041-PCT-FJM, 2010 WL 4607402, at \*1 n.1 (D. Ariz. Nov. 4, 2010). Relevance

25 <sup>2</sup> Although the products in the Tucows agreement have the same names as the products in  
 26 SiteLock’s agreement with GoDaddy, SiteLock has argued that identically named products may  
 have different features.

1 is “construed broadly to encompass any matter that bears on, or that reasonably could lead to  
 2 other matter that could bear on, any issue that is or may be in the case.” *Berwick v. Hartford*  
 3 *Fire Ins. Co.*, No. MC 12-00055-PHX-FJM, 2012 WL 2856117, at \*1 (D. Ariz. July 11, 2012)  
 4 (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (quotation marks  
 5 omitted)).

6 Fed. R. Civ. P. 45(d)(2)(B) requires that the recipient of a subpoena *duces tecum* serve  
 7 any objections to it within 14 days after service or before the time specified for compliance,  
 8 whichever is earlier. “[F]ailure to timely object waives the right to object later.” *Cen Com Inc.*  
 9 *v. Numerex Corp.*, No. C17-0560 RSM, 2018 WL 1737943, at \*2 (W.D. Wash., Apr. 11, 2018);  
 10 *see also Voxpath RS, LLC v. LG Elecs. U.S.A., Inc.*, No. MC 13-004- TUC-CKJ, 2013 WL  
 11 5744045, at \*3 (D. Ariz. Oct. 23, 2013) (“[A] nonparty’s failure to timely make objections to a  
 12 Rule 45 subpoena *duces tecum* generally requires the court to find that any objection has been  
 13 waived.”); *Avila v. Cate*, No. 1:09cv918-LJO-SKO, 2013 WL 428732, at \*2-3 (E.D. Cal. Feb.  
 14 1, 2013) (same); *McCoy v. Sw. Airlines Co., Inc.*, 211 F.R.D. 381, 385 (C.D. Cal. 2002) (same).  
 15 “Upon failing to obey a lawful subpoena without an adequate excuse, a recipient may be held in  
 16 contempt.” *Malden Transportation, Inc. v. Uber Technologies, Inc.*, No. C18-1592RSM, 2018  
 17 WL 5808422, at \*1 (W.D. Wash., Nov. 6, 2018) (citing Fed. R. Civ. P. 45(g)).

#### 18 **IV. TUCOWS MUST PRODUCE RESPONSIVE DOCUMENTS**

19 Tucows was served with GoDaddy’s subpoena on January 21, 2021. *See* Zecchini Decl.  
 20 ¶ 6, Ex. A. The subpoena required that Tucows produce documents by February 4, 2021. *See*  
 21 *id.* As such, Tucows’s objections or responses to the subpoena were due on or before February  
 22 4, 2021. To date, Tucows has failed to provide any response to the subpoena. *See id.* at ¶ 8.  
 23 Tucows has therefore waived all grounds for objection. *See McCoy*, 211 F.R.D. at 385; *see also*  
 24 *Voxpath RS, LLC*, 2013 WL 5744045, at \*3; *United States ex rel. Schwartz v. TRW, Inc.*, 211  
 25 F.R.D. 388, 392 (C.D. Cal. 2002); *Wade v. City of Fruitland*, 287 F.R.D. 638, 641 (D. Idaho  
 26

2013). As such, Tucows should be ordered to comply with the subpoena. *Malden Transportation, Inc.*, 2018 WL 5808422, at \*2 (granting motion to compel out-of-district subpoenaed documents when recipient failed to object or move to quash or modify subpoenas). Allowing a subpoena recipient to disregard a subpoena in its entirety would render Rule 45 a nullity and enable recipients to openly disobey a court order. *See, e.g., United States Sec. & Exch. Comm'n v. Hyatt*, 621 F.3d 687, 693 (7th Cir. 2010) (explaining that a Rule 45 subpoena is a “court order subject to contempt sanctions if disobeyed”).

Although Tucows waived any and all objections to the subpoena, if Tucows files a response, Tucows may attempt to argue that the subpoena did not command production of documents within “100 miles of where the person resides, is employed, or regularly transacts business in person.” Fed. R. Civ. Proc. 45(c)(2)(A). Such an objection would be meritless. First, Tucows waived any objection under that rule. *See Sol v. Whiting*, No. CV-10-01061-PHX-SRB 2014 WL 12526314, at \*2 (D. Ariz., July 22, 2014) (concluding that defendant waived objection to subpoena and stating “nothing in Rule 45 or elsewhere suggests that the rules for asserting timely objections do not apply when the 100-mile rule is the basis for an objection”). Second, “numerous courts have compelled compliance with a subpoena duces tecum that required the production of documents more than 100 miles from where the recipient resided, worked, or regularly transacted business.” *Sol*, 2014 WL 12526314, at \*2; *See also Walker v. Ctr. for Food Safety*, 667 F. Supp. 2d 133, 138 (D.D.C. 2009) (“[T]he 100 mile limit applies to travel by a subpoenaed person, but a person commanded to produce documents need not appear in person at the place of production or inspection.” (internal quotation marks omitted)); *Jett v. Penner*, No. S02-2036 GEBJFMP, 2007 WL 127790, at \*2 (E.D. Cal. Jan. 12, 2007) (holding subpoenaed party was not excused on the ground that the requested records were located more than 100 miles from the place they were to be produced when there was no requirement to travel to deliver the records). This is particularly true when the subpoena at issue requests that documents be provided electronically. *Cen Com Inc.*, 2018 WL 1737943, at \*2 (holding

1 subpoenas complied with Rule 45 because “[t]hey do not ask the individuals to travel more than  
 2 100 miles from where they live or work; rather, Defendants have requested that the documents  
 3 be provided electronically”); *see also Curtis v. Progressive Northern Insurance Company*, No.  
 4 CIV-17-1076-C, 2018 WL 2976432, at \*2 (W.D. Okla., June 13, 2018) (granting motion to  
 5 compel when the “subpoena at issue [did] not require the travel or attendance of any witnesses  
 6 and Plaintiff [was] requesting the production of electronic documents.”).

7 Further, the subpoena set forth targeted, limited document requests to obtain information  
 8 that is critical to GoDaddy’s defenses to SiteLock’s claims. In the SiteLock Action, GoDaddy  
 9 contends that SiteLock gave better pricing terms to other reseller partners in direct violation of  
 10 SiteLock’s obligation to provide GoDaddy with the most favorable pricing terms. *See* Dkt. No.  
 11 248 at 24-26 (denying SiteLock’s motion for protective order with regard to the type of  
 12 information sought by the subpoena, and finding that it was relevant to GoDaddy’s defenses to  
 13 SiteLock’s claims). The requests in the subpoena are specifically and narrowly targeted to  
 14 individual SiteLock products set forth in Tucows’s reseller agreement with SiteLock, and merely  
 15 demand documents “sufficient to show” (1) if SiteLock ever agreed to pricing terms with  
 16 Tucows below the terms set forth in Tucows’s contract with SiteLock, and (2) the features of  
 17 those products. Tucows should therefore be directed to fully comply with the subpoena.

## 18 **V. CONCLUSION**

19 WHEREFORE, GoDaddy respectfully requests that this Court issue an order compelling  
 20 Tucows to produce all documents responsive to the requests in the subpoena within ten (10) days  
 21 of the resolution of this motion.

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 LAW IN SUPPORT OF MOTION TO COMPEL RESPONSE TO  
 RULE 45 SUBPOENA DIRECTED TO TUCOWS.COM CO - 6

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1 DATED: February 25, 2021

COZEN O'CONNOR

2  
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LAW IN SUPPORT OF MOTION TO COMPEL RESPONSE TO  
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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing document via electronic mail on February 25, 2021, and due to COVID-19 restrictions via overnight mail on February 26, 2021, to the following:

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I further certify that the foregoing documents have been sent out for personal service, and due to COVID-19 restrictions were also served via overnight mail on February 26, 2021 on the following:

Tucows.com Co  
251 Little Falls Drive  
Wilmington, DE 19808

DATED: February 25, 2021

COZEN O'CONNOR

By: s/ Paula Zecchini  
Paula Zecchini